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III

EMPLOYER AND EMPLOYEE

UNDER THE

COMMON LAW

BY

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EMPLOYER AND EMPLOYEE UNDER THE COMMON LAW.*

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The relations existing between employers of labor and their employees, and the reciprocal duties, obligations, and rights growing out of those relations, are, in the absence of legislative enactments, governed by the common law in regard to master and servant, the words master and servant being legally synonymous with the words employer and employee.

The common law consists of principles, usages, and rules of action, applicable to the government and security of persons and property, which have grown into use by gradual adoption, without legislative authority, and have received, from time to time, the sanction of the courts of justice.

The great body of the common law of the United States consists of the common law of England, and such statutes thereof as were in force prior to the separation of this country from England, and applicable to circumstances and conditions prevailing here. These laws have been adopted as the basis of our jurisprudence in all the states except Louisiana, and many of the most valued principles of the English common law have been embodied in the constitutions of the United States and the several states.

In many details, however, the common law of the United States now differs widely from that of England by reason of modifications arising from different conditions and established by American adjudications. That branch of the common law governing the relation of master and servant has undergone some changes, although in the main it is the same in this country as in England. It is not the purpose of this article to point out such changes or differences, but to state the principles and rules of the common law now prevailing throughout the United States, except where they have been changed or modified by legislative enactments.

The statement which follows is derived from articles in the American and English Encyclopedia of Law on the subject of "Master and servant" and kindred topics, and from standard legal works treating of the subject under consideration. The reader should bear in mind that any rule or principle of the common law, as given in this statement, conflicting with a statute which has not been declared invalid or unconstitutional by the courts, is modified or changed by the statute, and that the statute instead of the common law now governs.

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MASTER AND SERVANT: DEFINITIONS.—A master is variously defined as one who has in his employment one or more persons hired by contract to serve him either as domestic or common laborers; one who has the superior choice, control, and direction, whose will is represented not merely in the ultimate result of the work in hand, but in all its details; one who is the responsible head of a given industry; one who not only prescribes the end, but directs, or may at any time direct the means and methods of doing the work; one who has the power to discharge; a head or chief; an employer; a director; a governor.

A servant is one who is employed to render personal service to his employer otherwise than in the pursuit of an independent calling, and who, in such service, remains entirely under the control and direction of the latter.

THE RELATION: ITS CREATION AND EXISTENCE.—The relation of master and servant is created by contract, either express or implied, where both parties have the requisite legal qualifications for entering into a valid contract. The relation exists only where the person sought to be charged as master employs and controls the other party to the contract of service, or expressly or tacitly assents to the rendition of the particular service by him. The master must have the right to direct the action of the servant, and to accept or reject his service. The relation does not cease so long as the master retains his control or right of control over the methods and manner of doing the work, or the agencies by which it is effected. Furthermore, the relation exists where the servant is employed, not by the master directly, but by an employee in charge of a part of the master's business with authority to engage assistance therein.

THE CONTRACT OF SERVICE.—A contract of employment is one by which an employer engages an employee to do something for the benefit of the employer, or of a third person, for a sufficient consideration, expressed or implied. The authority of a subordinate to employ an agent or servant includes, in the absence of restrictive words, authority to make a complete contract, definite as to the amount of wages, as well as to all other terms.

Ordinarily, when an adult person solicits employment in a particular line of work, the solicitation carries with it an implied assertion that the one seeking employment is competent to perform the ordinary duties of the position sought; and it is an implied condition of every contract of service that the employee is competent to discharge the duties of his employment.

A servant is presumed to have been hired for such length of time as the parties adopt for the estimation of wages; for example, a hiring at a yearly rate is presumed to be for one year; at a daily rate, for one day; a hiring by piecework, for no specified time; but such fact does not, in the absence of other evidence, necessarily fix the period of hiring.

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Where an employee has been hired to work by the week or month, the burden of proof is upon him to show any change in the contract of employment as to the term of service.

It is a general rule that where a person enters into a contract of service for a fixed compensation, he, prima facie, agrees to give his employer his entire time; but this rule is not inflexible.

A contract for service running for a longer period of time than one year, to be valid, must be in writing and signed by the party against whom it may be sought to be enforced, or by his authorized agent.

In the absence of an express contract of hiring, a person may recover compensation for services where the same were rendered under such circumstances as to show that he expected such compensation as a matter of right, and that the person for whom they were rendered was bound to know that he claimed compensation, or was legally entitled thereto. Where one person performs labor for another, a request and a promise to pay the reasonable worth of such labor are presumed by law, unless it is understood that the labor is to be gratuitously performed, or it is performed under such circumstances as to repel the presumption of a promise to pay.

Where there is an express contract the servant must be furnished with employment by the master during the period covered by its terms. If by the terms of the contract the servant is employed to work by the day, week, month, or year, and nothing is said as to the time of payment for his services, the wages are due and may be demanded at the close of each day, week, month, or year, as the case may be; but in such case, as upon all questions relating to the interpretation of contracts, custom has a strong bearing.

A man can contract to furnish his own services and those of his wife, and if she makes no separate claim can sue for them; and if such contract needs ratifying, the testimony of the wife in support of his demand will be a sufficient ratification.

A wife is not responsible for the wages of her husband's employee, notwithstanding the fact that she sometimes pays such wages.

When a master agrees to pay his servant what he considers the servant's services to be reasonably worth, or, where he agrees to pay the same wages as shall be paid to other men in his employ filling similar positions, and there is no showing that the master has other employees in similar positions, the servant is entitled to recover, in a suit for wages, what his services were actually worth. And where the master and servant agree as to the existence of the contract of service, but disagree as to the wages to be paid, the question of compensation must be left to a jury.

Unless otherwise agreed, the wages of an employee must be paid in cash. The master has no right to handle, or invest, or in any manner

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apply such wages, whether beneficial to the servant or not, but must pay them directly to him.

An employer may discharge an employee before the expiration of the term of service stipulated in the contract for good and sufficient cause, as, for incompetency. The discharge must be couched in such terms as to leave no doubt in the employee's mind of the employer's desire to terminate the relation.

In a majority of the states a contract for service for a specified time is considered apportionable, and an employee who has been discharged for cause is entitled to compensation for the work he has actually performed.

Where one has contracted to employ another for a certain period of time, at a specified price for the entire time, and discharges him wrongfully before the expiration thereof, the wrongfully discharged employee is entitled to recover an amount equal to the stipulated wages for the whole period covered by the contract, less the sum earned, or which might have been earned in other employment during the period covered by the breach. Upon dismissal a servant, under the law, must seek other employment, but extraordinary diligence in such seeking is not required of him. He is only required to use reasonable efforts, and he is not bound to seek employment or render service of a different kind or grade from that which he was engaged to perform under the violated contract, nor to seek employment in a different neighborhood; and if he fails to secure employment and works on his own account the value of such work cannot be deducted from his claim.

Where an employee for a fixed period, at a salary for the period, payable at intervals, is wrongfully discharged, he may pursue one of four courses—

1. He may sue at once for the breach of contract, in which case he can only recover his damages up to the time of bringing the suit.

2. He may wait until the end of the contract period, and then sue for the breach.

3. He may treat the contract as existing, and sue at each period of payment for the wages then due.

4. He may treat the contract as rescinded, and sue immediately for the value of his services performed, in which case he can only recover for the time he actually served.

An employee is entitled to recover damages from a person who maliciously procures his discharge, provided he proves that the discharge resulted in damage to him.

An employer is entitled to maintain an action against anyone who knowingly entices away his servant, or wrongfully prevents the servant from performing his duty, or permits the servant to stay with him and harbors such servant with the intention of depriving the master of his services.

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COMBINATIONS AND COERCION OF SERVANTS.—Everyone has the right to work or to refuse to work for whom and on what terms he pleases, or to refuse to deal with whom he pleases; and a number of persons, if they have no unlawful object in view, have the right to agree that they will not work for or deal with certain persons, or that they will not work under a fixed price or without certain conditions.

The right of employees to refuse to work, either singly or in combination, except upon terms and conditions satisfactory to themselves, is balanced by the right of employers to refuse to engage the services of anyone for any reason they deem proper. The master may fix the wages, and other conditions not unlawful, upon which he will employ workmen, and has the right to refuse to employ them upon any other terms. In short, both employers and employees are entitled to exercise the fullest liberty in entering into contracts of service, and neither party can hold the other responsible for refusing to enter into such contracts.

It has been held, however, that employers in separate, independent establishments have no right to combine for the purpose of preventing workmen, who have incurred the hostility of one of them, from securing employment upon any terms, and by the method commonly known as blacklisting debarring such workmen from exercising their vocation, such a combination being regarded as a criminal conspiracy.

On the other hand, a combination of employees having for its purpose the accomplishment of an illegal object is unlawful; for instance, a conspiracy to extort money from an employer by inducing his workmen to leave him and deterring others from entering his service, is illegal; and an association which undertakes to coerce workmen to become members thereof or to dictate to employers as to the methods or terms upon which their business shall be conducted, by means of force, threats, or intimidation interfering with their traffic or lawful employment of other persons is, as to such purposes, an illegal combination.

Unlawful interference by employees, or former employees, or persons acting in sympathy with them, with the business of a railroad company in the hands of a receiver, renders the persons interfering liable to punishment for contempt of court.

EMPLOYER'S LIABILITY FOR INJURIES OF EMPLOYEES.—Where a person employs an independent contractor to do work for him, and retains or exercises no control over the means or methods by which the work is to be accomplished, he is not answerable for the wrongful acts of such contractor; and the same rule governs as between a contractor and a subcontractor. Under these circumstances an employer would not be liable for an injury sustained by a workman in the course of his employment for which he would have been liable had the work been performed under his own direction.

An employer is ordinarily liable in damages to his employee who sustains an injury through the employer's negligence. Such negli-

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gence may consist in the doing of something by the employer which, in the exercise of ordinary care and prudence, he ought not to have done, or in the omission of any duty or precaution which a prudent, careful man would or ought to have taken.

An important duty on the part of a master is to furnish his servant with such appliances, tools, and machinery as are suited to his employment and may be used with safety; and if a master fails to use ordinary care in the selection or care of such appliances his ignorance of a defect therein will not excuse him from liability for an injury caused thereby; he is responsible for all defects in machinery or appliances of which he should have known, but failed through negligence to learn of, or which, having learned of, he has failed to remedy.

A railroad company is liable for injuries to its employees occasioned by the company's negligence in failing to keep its track or roadbed in proper condition; but such company is not bound to furnish an absolutely safe track or roadbed, its duty only being to use all reasonable care in keeping it in safe condition.

A railroad company is likewise liable if it fails to keep its track clear of obstructions and structures dangerously near the same; but such company is not negligent because it erects and maintains structures and contrivances for use in the operation of its road merely for the reason that they may be dangerous to employees operating the company's trains.

It is negligence for such a company to fail to use safe and appropriate engines; or to have the boilers of its engines properly tested; or to furnish suitable freight or passenger cars, and proper and safe attachments and appliances to be used in connection therewith; and such company cannot divest itself of its duty to use due care and diligence with respect to the cars of other companies to be moved and handled by its employees, in seeing that such cars are in safe condition to be so moved and handled, by contracts with such other companies that they shall keep their cars in repair.

It is negligence in such a company to permit its employees to disobey its orders, and it is liable for injuries arising from the careless or reckless running of its trains, or the starting thereof without notice, or the running of its trains at immoderate speed.

Railroad companies, and employers of every description, are negligent if they fail to protect a servant who is exposed to danger; but such a company is not absolutely bound to take all possible precautions against storms, or against washouts, landslides, or other obstructions which may be dangerous to its employees. And if the mill of a manufacturing corporation is properly constructed for the carrying on of its ordinary business, the corporation is not liable to an employee who has been injured by a fire, not caused by the negligence of the corporation, because it failed to provide means of escape from the fire; nor is such

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corporation liable for an accident resulting in injury to an employee from its failure to fence the ordinary machinery used in the servant's employment ; if, however, there is a custom in reference to the adoption of certain safeguards in a given business, so general that the employer is presumed to have knowledge of it, he is guilty of negligence if he fails to adopt such safeguards.

A master is not chargeable with negligence when an employee is injured through the use of a machine for an improper or dangerous purpose, for which it was not intended or provided, but is guilty of negligence when he exposes an employee to dangers not obvious or fairly incident to the employment, or where he introduces new and unusual machinery, involving unexpected danger, without notice to his employee.

Employers are not, as a rule, required to furnish the best and latest improved machinery, but only such as is reasonably safe and suitable. Railroad companies, however, are ordinarily bound to adopt new inventions as soon as they have been proved by satisfactory tests to be safer than the appliances in use.

While it is the duty of an employer to exercise reasonable care in keeping buildings, machinery, tools, etc., in suitable and safe condition for use, and to this end he should frequently inspect the machinery, etc., used by his employees, the system of inspection need not be carried to such an extent as will embarrass the operation of his business.

A master who sets a servant at work in a place of danger without giving him such warning and instruction as the youthfulness, inexperience, or lack of capacity on the part of the servant reasonably requires, is guilty of negligence, and liable to the servant for an injury arising therefrom. The fact, however, that a master sets a minor servant to work at a more dangerous occupation than that in which he was originally employed does not, in itself, render the master liable for an injury resulting therefrom, unless under all the circumstances the setting him at such work was a negligent act ; but the master will be held more strictly accountable in such a case than in the case of an adult.

Proprietors of manufacturing establishments are charged with the duty of exercising ordinary care in providing their employees with suitable places in which they can work in reasonable safety, and without exposure to dangers not within the usual scope of their employment.

It is the duty of employers to make and promulgate such rules and regulations for the government of their employees as will, if observed, give them reasonable protection ; and employees are bound to obey all the lawful and reasonable commands of their employers, though such commands may seem harsh and severe.

It is also the duty of employers to have a sufficient number of trustworthy, competent employees to properly and safely perform the labor required in the business in which they are engaged.

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When certain duties are imposed upon an employer by legislative enactment or municipal ordinance, designed for the protection of his employees, it is negligence on his part to fail to comply with such requirements, and he is liable to his employees for injuries arising from such negligence, unless it can be clearly shown that they assumed the risk.

An employer cannot avoid his liability to an employee for injuries sustained by the latter through his negligence by means of a contract with such employee which provides that in consideration of the employment he shall be exempt from such liability. Such a contract is against public policy and void. The supreme court of the state of Georgia has, however, sustained the validity of contracts of this character.

CONTRIBUTORY NEGLIGENCE BY EMPLOYEES.—It is a general rule that when an employee suffers an injury through the negligence of his employer he is not entitled to recover damages for such injury if his own negligence contributed thereto. Under this rule, where master and servant have equal knowledge of the danger of the service and the means of avoiding it and the servant while engaged in the performance of his duties is injured by reason of his own inattention and negligence, the master is not liable; and where the servant is told to do a particular thing and is not directed as to the time or manner in which the work is to be done, it being left to his discretion, so that he is given some control over the means, time, and manner of doing it, he is guilty of contributory negligence if he does not use the safest means, time, and method of accomplishing the work and is injured while so engaged, and cannot recover damages from the master; nor can he recover such damages if injured by the use of a defective appliance under his own exclusive care; nor where he had knowledge of a defect in an appliance used by him, through which he is injured, and failed to notify the master thereof, if no blame was imputable to the latter in failing to discover such defect, or in failing to furnish a safe and suitable appliance.

But an employee's right to recover damages for an injury is not affected by his having contributed thereto unless he was at fault in so contributing, and he may recover, notwithstanding his contributory negligence, if the master, after becoming aware of the danger, failed to exercise ordinary care to prevent the injury or willfully inflicted the damage.

When an employee in the course of his employment finds himself exposed to imminent peril due to the master's negligence, and in the terror of the moment adopts a course exposing him to a greater peril and is injured, such action on his part does not constitute contributory negligence, and will not relieve the master from liability.

An employee is not guilty of contributory negligence if, when injured, he was exercising ordinary care to avoid injury, and discharging his

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duties in a careful and prudent manner, and the injury was sustained by reason of negligent failure on the part of the employer to exercise ordinary care for the employee's safety, as failure to warn the employee of extraneous risks and unusual dangers known to the employer but unknown to the employee, or to instruct an immature or inexperienced servant and warn him of the dangers attending his work not obvious to one of his capacity or experience; to provide suitable machinery, tools, and appliances for carrying on the work at which the servant is employed; to inspect and repair machinery, tools, and appliances; to provide a safe place for the servant to work, the ordinary risks of the business excepted; to guard against a danger to a servant of which the master has been notified, or which he has promised to obviate, or which he has assured the servant did not exist; to make and promulgate proper rules and regulations for the conduct of the employment in which the servant is engaged; to employ and retain a sufficient number of competent and trustworthy servants to properly and safely carry on the business. The employee does not assume the risk of injury by reason of the negligent failure of his employer in fulfilling any of the duties incumbent upon him, and, as before stated, is not guilty of contributory negligence when injured by such failure, if he himself was without fault in the discharge of his duty.

Contributory negligence is purely a matter of defense in actions by employees for damages resulting from injuries sustained during the course of their employment, and the burden of proving it is upon the master who seeks thereby to avoid liability for such damages.

Assumption of Risks by Employees.—Where an employment is accompanied with risks of which those who enter it have, or are presumed to have, notice, they cannot, if they are injured by exposure to such risks, recover compensation for the injuries from their employer; by contracting to perform hazardous duties the employee assumes such risks as are incident to their discharge, and he assumes not only the risks existing at the beginning of his employment, but also such as arise during its course, if he had or was bound to have knowledge thereof. He does not, however, assume the risk of dangers arising from unsafe or defective methods, machinery, or other instrumentalities, unless he has, or may be presumed to have, knowledge or notice thereof, and the burden of proving that an injured employee had such knowledge or notice of the defect or obstruction causing the injury is upon the employer.

The employee assumes all risk of latent defects in appliances or machinery, unless the master was negligent in not discovering the same; but the experience, or lack of experience, of the employee is to be considered in determining whether or not he is chargeable with knowledge of such defects as are not obvious and of the danger arising therefrom.

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Another risk assumed by employees is that of the master's method of conducting his business. If the employee enters upon the service with knowledge of the risk attending the method, he cannot hold the master responsible for injuries arising from the use of such method though a safer one might have been adopted; but in order to relieve the master from liability the method must amount to a custom or mode of carrying on the business, and not consist merely of an instance or any number of instances of culpable negligence on the part of the master.

NEGLIGENCE OF FELLOW-SERVANTS.—The general rule at common law is that he who engages in the employment of another for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services. The perils arising from the carelessness and negligence of those who are in the same employment are no exception to this rule, and where a master uses due diligence in the selection of competent, trusty servants and furnishes them with suitable means to perform the services in which he employs them, he is not answerable to one of them for an injury received in consequence of the carelessness or negligence of another, while both are engaged in the same service.

Various attempts have been made by judges and text writers to lay down some rule or formula by which to determine what servants of a common master may be said to be fellow-servants assuming the risk of each other's negligence. The following are well-known definitions:

Persons are fellow-servants where they are engaged in the same common pursuit under the same general control.

All who serve the same master, work under the same control, derive authority and compensation from the same common source, and are engaged in the same general business, though it may be in different grades or departments of it, are fellow-servants who take the risk of each other's negligence.

The true test of fellow-service is community in that which is the test of service; which is subjection to control and direction by the same common master in the same common pursuit. If servants are employed and paid by the same master, and their duties are such as to bring them into such a relation that the negligence of the one in doing his work may injure the other in the performance of his, then they are engaged in the same common pursuit, and being subject to the same control they are fellow-servants.

All servants in the employ of the same master, subject to the same general control, paid from a common fund, and engaged in promoting or accomplishing the same common object, are to be held fellow-servants in a common employment.

It is said that these definitions are faulty, and of little practical value by reason of their being stated so broadly and in such general and comprehensive terms, nevertheless they give a correct idea as to who have been determined by many courts to be fellow-servants within the

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rule exempting the master from liability for the negligence of one of them resulting injuriously to another.

The principal limitation contended for on the general rule in regard to fellow-servants is that there is such a servant as vice-principal, who takes the place of the master and is not a fellow-servant with those beneath him; and there is a variation of this idea to the effect that every superior servant is a vice-principal as to those beneath him. The doctrine of vice-principal is, however, repudiated by the courts of many of the States.

The master, as such, is required to perform certain duties which have been hereinbefore specified, and the person who discharges any of these duties, no matter what his rank or grade, no matter by what name he may be designated, cannot be a servant within the meaning of the general rule on fellow-servants. The liability of the master for the nonperformance of such duties as the law implies from the contract of service, does not rest upon the ground of guarantee of their performance, but upon the fact of the presence or absence of negligence of the master in their performance.

Whether one is acting as the representative of the master or merely as the fellow-servant with others employed by the same master, does not depend upon his rank or title, but upon the character of the duties he is performing at the time another servant is injured through his negligence; if at such time the offending servant was in the performance of a duty which the master owed his servants, he was not a fellow-servant with the one injured, but a vice-principal, for the rule is fundamental that a master cannot rid himself of a duty he owes to his servants by delegating his authority to another and thus escape responsibility for negligence in the performance of such duty.

If, however, at the time of the injury the negligent servant was not engaged in the performance of duty due from the master to his servants, but was discharging a duty which was due from the servant to the master, he was a fellow-servant to the one injured, engaged in the same common business, and the master would not be liable for the injuries sustained by reason of his negligence.

It is held by the courts of some of the states that, as industrial enterprises have grown, and, because of the division of labor and the magnitude of operations, have been divided into distinct and separate departments, a laborer in one department is not a fellow-servant with a laborer in another and separate department of the same establishment.

INCOMPETENCY OF FELLOW-SERVANTS.—If an employer knowingly employs or retains an incompetent servant he is liable for an injury to a fellow-servant sustained through the incompetency of the servant so employed or retained, provided the injured servant did not know and had not the means of knowing the incompetency of his fellow servant. A master is not, however, liable for injuries to one servant by the

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negligence of another on the ground of unskillfulness of the latter unless the injuries were caused by such unskillfulness.

A master does not warrant the competency of his servants, but must use all ordinary care and diligence in their selection and retention. If he has not been negligent in selecting a servant, and subsequently obtains knowledge of the servant's incompetence and still retains him, he is liable to another servant for any injury resulting from said incompetence. If the employer had no actual notice of the servant's incompetence, if it was notorious and of such a character that with proper care he would have known of it, he will still be liable.

If a person, knowing the hazards of his employment as it is conducted, voluntarily continues therein without any promise by the master to do any act to render the same less hazardous, the master will not be liable for an injury he may sustain therein, unless it is caused by the willful act of the master. No servant is entitled to damages resulting from the incompetence of a fellow-servant when he knew of such incompetence and did not inform his employer of the same.

When it is alleged that the master has been guilty of selecting or retaining an incompetent servant, the burden of proof of said allegation is on the plaintiff. Neither incompetency nor unskillfulness will be presumed; they must be proved.

A master who has employed skillful and competent general agents or superintendents is liable for injuries received by inferior servants through the negligence of those employed by such general agents or superintendents without due care or inquiry, or retained by them after knowledge of their incompetence.

While the servant assumes the ordinary risks, and, as a general rule, such extraordinary risks of his employment as he knowingly and voluntarily encounters, he is not required to exercise the same degree of care as the master in investigating the risks to which he may be exposed; he has the right to assume that the appliances and machinery furnished him by the master are safe and suitable for the employment in which he is engaged; and to assume, when engaged in an occupation attended with danger and requiring engrossing duties, that the master will not, without proper warning, subject him to other dangers unknown to him, and from which his occupation necessarily distracts his attention; and he has the right to rely upon the taking by the master of all usual and proper precautions against accident, and his faithful fulfillment of all the duties devolving upon him.

If an employee is ordered by his master into a situation of danger and obeys, he does not assume the risk unless the danger was so obvious that no prudent man would have obeyed the order; and the master will be liable for any injury resulting to him by reason of such dangerous employment. If, however, he leaves his own place of work for one

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more dangerous, in violation of the master's direction, he cannot recover for an injury sustained after such change.

If the servant, upon being ordered to perform duties more dangerous than those embraced in his original employment, undertakes the same with knowledge of their dangerous character, unwillingly and from fear of losing his employment, he cannot, if injured, recover damages from the master; nor can he recover such damages where the injury results from an unexpected cause during the course of his employment; nor where the injury is sustained in the performance of a service not within the scope of his duty, if his opportunity for observing the danger is equal to that of his employer; and where an employee voluntarily assumes a risk he thereby waives the provisions of a statute made for his protection.

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